



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2080 OF 2015**

**JUDY WACERA NJAU.....CLAIMANT**

**VERSUS**

**BELLADONNA PHARMACY LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant, Judy Wacera Njau was an employee of Belladonna Pharmacy Ltd, the Respondent herein, working in the position of Pharmaceutical Technologist. She was first employed in 2006 and left upon resignation in September 2009. She was re-employed more than 5 years later on 19<sup>th</sup> April 2015. This dispute arises from termination of her second stint of employment on 18<sup>th</sup> July 2015.
2. The Claimant’s claim is stated in a Memorandum of Claim dated 19<sup>th</sup> November 2015 and the Respondent’s defence is contained in a Memorandum of Reply dated 22<sup>nd</sup> March 2016 to which the Claimant responded on 12<sup>th</sup> April 2016.
3. When the matter came up for hearing, the Claimant testified on her own behalf and the Respondent called its Director, Angela Ogang. The parties subsequently filed written submissions.

**The Claimant’s Case**

4. The Claimant was employed by the Respondent as a Pharmaceutical Technologist on 19<sup>th</sup> April 2015. She earned a monthly salary of Kshs. 77,702. She claims that upon learning of her pregnancy, the Respondent terminated her employment contract on 18<sup>th</sup> July 2015, without justifiable cause and in violation of due procedure.
5. The Claimant’s case is that the termination of her employment was based on her pregnancy and was therefore unlawful and discriminatory against her contrary to Section 5 of the Employment Act and Article 27 of the Constitution of Kenya, 2010.
6. The Claimant’s claim against the Respondent is as follows:

- a) 12 months’ salary in compensation.....Kshs. 932,424
- b) House allowance for 12 months.....139,863
- c) Prorata leave for period worked.....31,598
- d) General damages for unlawful termination of employment and breach of fundamental rights under Articles 27,41 and 47 of the Constitution
- e) Costs plus interest

**The Respondent’s Case**

7. In its Memorandum of Reply dated 22<sup>nd</sup> March 2016 and filed in court on 23<sup>rd</sup> March 2016, the Respondent pleads that vide letter of appointment dated 19<sup>th</sup> April 2015, the Claimant was engaged as a Pharmaceutical Technologist on a contract running from 12<sup>th</sup> May 2015 to 31<sup>st</sup> October 2017, subject to three (3) months’ probation period.

8. The Respondent states that the Claimant was not confirmed after the probation period due to her performance and the Respondent's operational requirements. Notice of termination during the probation period was issued on 18<sup>th</sup> July 2015.

9. The Respondent denies discriminating against the Claimant on account of her pregnancy and maintains that the termination was lawful and fair.

### **Findings and Determination**

10. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant has proved a case of discrimination;
- c) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Discriminatory Termination?**

11. The Claimant's employment was terminated by letter dated 18<sup>th</sup> July 2015, stating as follows:

*"Dear Judy,*

**RE: PROBATIONARY PERIOD TERMINATION**

*You are currently appointed to your position as Pharmaceutical Technologist at Belladonna Pharmacy Ltd. (the "Company") in a probationary status. The Employment Act Cap 226 that governs your employment states in Section 42(4) that "A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment by the employer to the employee, of seven days' wages in lieu of notice."*

*We have determined that it is in the Company's best interest that your current probationary appointment not be continued, and we are hereby giving you seven (7) days notice of termination of your probationary period. You will not be required to work your notice period and will be paid in lieu of notice based on your current salary. This is in addition to the number of days worked this month. However, please note that we reserve the right to deduct from your final paycheck any overpayment made to you in the course of your employment.*

*We would like to thank you for your service to Belladonna Pharmacy. We are happy to provide any future employer with a reference if a request is made in writing to the undersigned.*

*We wish you success in your future plans for work.*

*Sincerely,*

*(Signed)*

*Angela Ogang*

*Director"*

12. This letter cites the Respondent's interest as the reason for termination of the Claimant's employment. It is not in contest that at the time of termination, the Claimant was serving probation. In the final submissions filed on behalf of the Respondent on 2<sup>nd</sup> May 2019, reference was made to Section 42(1) of the Employment Act, 2007 which provides that the procedural fairness requirements set under Section 41 of the Act do not apply in cases of termination of a probationary contract of employment.

13. Application of this law was well captured in *Carole Nyambura Thiga v Oxfam [2013] eKLR* in the following words:

***"Probation is served by new employees to provide job adjustment opportunity for both the new employee and the employer, to determine whether to continue with the employment relationship. Under Section 42(1) of the Employment Act 2007, an employee who is on probation, is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment."***

14. The essence of probation is to allow the parties to an employment contract the opportunity to check each other and confirm whether they would like to enter into a long term employment relationship. In my view the flexibility allowed in termination of probationary contracts of employment is borne out of the need for an easy disengagement at the initial stages. The Court must however be wary of an employer who uses this flexibility to achieve some collateral purpose.

15. The Claimant told the Court that sometime in mid-June 2015, she disclosed to Angela Ogang that she was pregnant. Angela assured the

Claimant that her pregnancy would not be a factor in her confirmation which would depend solely on her performance. The Claimant however deems the termination of her employment, which came soon after her conversation with Angela, as a calculated move to get rid of her because she was pregnant. Granted that the Respondent was at liberty to terminate the Claimant's probationary appointment without recourse to the dictates of Section 41 of the Employment Act, this did not offer an avenue to break some other law in the process.

16. This case turns on the question whether, the Respondent's action was driven by the Claimant's pregnancy thus violating the law against discrimination. Article 27 of the Constitution of Kenya, 2010 which guarantees equality and freedom from discrimination provides as follows:

**27. (1) Every person is equal before the law and has the right to equal Protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

17. In similar fashion, Section 5(2) and (3) of the Employment Act provides that:

**(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.**

**(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-**

**(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;**

**(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.**

18. The Respondent's line of defence is that the Claimant's employment was terminated on account of poor performance and not her pregnancy. Angela Ogang testified that the Claimant's performance was appraised in July 2015. She however did not produce any appraisal report and the Court could not tell the shortcomings that made the Claimant to miss the mark for confirmation.

19. Section 5(6) of the Employment Act provides the following:

**(6) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds specified in this section.**

20. My understanding of this provision, which finds concurrence in the ILO Maternity Protection Convention Number 183 [2000] and the UN Convention on the Elimination of All Forms of Discrimination (CEDAW) is that once an employee establishes a *prima facie* case of discrimination, then the burden to disprove the discrimination shifts to the employer. In this regard, I am persuaded by the holding in **GMV v Bank of Africa Kenya Limited [2013] eKLR** that once an employee establishes a *prima facie* case, the employer has an obligation to demonstrate a clear, specific and non-discriminatory reason for the impugned termination. If the employer fails to discharge this burden, then the Court will reach the conclusion that the reason advanced is pretextual, a mask to hide the real reason, which the employer knows is discriminatory.

21. Assuming that the Claimant's performance was indeed below the Respondent's expectations, the question remains as to the measure employed to arrive at this adverse conclusion. This Court has stated many times that a performance appraisal must not only be documented but must be shown to have involved the active participation of the appraisee (see **Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR** and **Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR**)

22. The Respondent failed to provide any evidence to back its assertion that the termination of the Claimant's employment was informed by her performance and not her pregnancy. For this reason, the Court finds and holds that the reason advanced was pretextual and the real reason was in fact discriminatory.

## **Remedies**

23. Having found the Respondent guilty of discrimination, I also find that the termination of the Claimant's employment was substantively and procedurally unfair.

24. This being an employment dispute, the Court is guided by the twin principles of proportionality and fairness in making its final award. True, the Claimant suffered discrimination but she had served the Respondent for barely two months under the subject contract. At the time of trial, she had found alternative employment and had moved on.

25. Taking all these factors into account I will award the Claimant the global sum of Kshs. 1,000,000 as composite damages.

26. Regarding the claim for house allowance, the only thing I will say is that from her letter of appointment, it is evident that the Claimant earned a gross salary, which would ordinarily include house allowance.

27. Finally, I enter judgment in favour of the Claimant and against the Respondent in the sum of Kshs. 1,000,000.

28. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

29. The Claimant will have the costs of the case.

30. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 27<sup>TH</sup> DAY OF MAY 2019**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Kabaru for the Claimant

Mrs. Omondi for the Respondent